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SENATE

REPORT
No. 91-1113

# CAPT. CLAIRE E. BROU (U.S. AIR FORCE, RETIRED)

AUGUST 12 (legislative day, AUGUST 11), 1970.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany S. 3419]

The Committee on the Judiciary, to which was referred the bill (S. 3419) for the relief of Capt. Claire E. Brou (U.S. Air Force, retired), having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

### AMENDMENT

On page 1, line 7 strike out the figure "$200,000" and insert in lieu thereof "$100,000".

### PURPOSE

The purpose of the proposed legislation is to pay to Capt. Claire E. Brou (U.S. Air Force, retired) the sum of $100,000 in full settlement of all her claims against the United States arising from injuries she sustained in April 1968, while undergoing a diagnostic study at the Walter Reed Army Medical Center.

### STATEMENT

The Department of the Army opposes enactment of this legislation in its report dated April 28, 1970, to the Honorable James O. Eastland, chairman of the Committee on the Judiciary. A review of this claim and the file in connection therewith reveals that this matter is one of many facets and many ramifications. Aside from the report of the Department of the Army there have been transmitted to the committee two affidavits—one by the claimant dated May 15, 1970, and one by her civilian doctor dated May 18, 1970. There has also been submitted a clinical record from Walter Reed Army Medical Center setting forth a narrative summary of hospital proceedings and related matters.

The committee deems it best in order to evaluate this claim to set forth at this point in full the report of the Department of the Army, the two affidavits hereinabove referred to, and the clinical record from Walter Reed Army Hospital.

DEPARTMENT OF THE ARMY,
*Washington, D.C., April 28, 1970.*

Hon. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,*
*U.S. Senate*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army on S. 3419, 91st Congress, a bill for the relief of Capt. Claire E. Brou.

This bill would provide for the payment of $200,000 to Captain Claire E. Brou (retired, U.S. Air Force FR 3195973), of Ocean Springs, Miss., in full settlement of all her claims against the United States arising from injuries she sustained in April 1968, while undergoing a diagnostic study at the Walter Reed Army Medical Center.

The Department of the Army has great sympathy for the tragic circumstances in which Captain Brou finds herself. However, for the reasons set forth below, we cannot recommend enactment of the bill.

After 14 years' service with the Navy in an enlisted and commissioned status, she transferred to the Regular Air Force on October 18, 1967. Effective September 19, 1968, Captain Brou was retired from active service for physical disability under the provisions of title 10, United States Code, section 1201, and receives $606.95 per month in retirement pay.

Captain Brou's disability retirement was due to cerebrovascular damage of the brain stem, secondary to a radiological diagnostic procedure performed on April 17, 1968, at the Walter Reed Army Medical Center, Washington, D.C. The injury resulted in the loss of the use of her right arm; a severe limp, necessitating a short leg brace on the right side; double vision, necessitating an eye patch; a spastic right facial nerve, resulting in frequent grimacing and drooling; and an inability to sense the position of her right arm and leg. The diagnostic procedure was performed as part of routine studies regarding a circular abnormality in Captain Brou's right eye orbit which caused her eye to bulge in a conspicious manner. On August 27, 1968, a U.S. Air Force physical evaluation board found Captain Brou to be 100 percent permanently disabled, as follows:

| | *Percent* |
|---|---|
| a. Paralysis, complete all ridicular groups (upper extremity) | 90 |
| b. Paralysis, incomplete, severe, sciatic nerve, right | 60 |
| c. Diplopia, all fields, requiring use of eye patch | 30 |
| d. Paralysis, incomplete, severe, left facial nerve associated with moderate paralysis left fifth cranial nerve | 20 |

(A detailed medical summary is attached as an inclosure to this report.)

Department of the Army records reveal no evidence of misfeasance or negligence on the part of Army personnel in the performance of the above diagnostic procedure or during subsequent treatment. Even if such evidence were revealed by the records, Captain Brou would be barred from filing a claim against the United States for injuries under the doctrine of *Feres, et al*, v. *United States* (340 U.S. 135 (1950)). In the *Feres* case the Supreme Court held that no claim would lie under

the Federal Tort Claims Act, title 28, United States Code, section 2672 *et seq.*, if the injury arose out of, or in the course of, activities incident to the claimant's active military service. It is well settled that injury while undergoing medical treatment or examination while on active duty is incurred incident to service within the meaning of *Feres. Knock* v. *United States*, 316 F. 2d 532 (9th Cir. 1963); *Richardson* v. *United States* (226 F. Supp. 49 (E.D. Va. 1964)). Even if evidence of medical malpractice were to be adduced, Captain Brou would be barred from bringing suit against the individual medical officer guilty of such negligence. *Bailey* v. *Dequevado* (375 F. 2d 72 (3rd Cir. 1967, cert. denied, 389 U.S. 923 (1967)); *Bailey* v. *Van Buskirk* (345 F. 2d 298 (9th Cir. 1965) cert. denied, 383 U.S. 948 (1966)).

In view of the fact that she was on active military duty at the time of the injury, Captain Brou has no legal basis for recovery beyond the statutory benefits she is now receiving. The question arises whether there are any special circumstances or equitable considerations which would support an additional award. Captain Brou now receives disability retirement pay in the amount of approximately $606.95 per month, hospitalization and outpatient care, including physical and vocational therapy, at both military and Veterans' Administration medical facilities, and in-house medical care, if necessary. Educational and additional financial benefits are also available. At her present age and applying accepted actuarial formulae her retired pay alone will aggregate an amount in excess of that asked in the present bill. These benefits are provided in lieu of the right to seek redress of injury in the Federal courts, and are part of a carefully developed concept of compensation which applies to large numbers of active duty members, including those who have sustained equally serious injuries in combat. The present bill, which would provide for a special award of $200,000.00, would single Captain Brou out for special, preferential treatment. Such special treatment for Captain Brou would not be justified.

The cost of this bill, if enacted, will be $200,000.00.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

STANLEY R. RESOR,
*Secretary of the Army.*

MEDICAL SUMMARY

In December of 1967, Captain Brou was admitted to the Neurosurgical Service, Walter Reed General Hospital where a retrograde right petrosal sinogram was performed, revealing a venous varix in the right orbit behind the right eyeball, and was then discharged. On April 15, 1968, she was again admitted, expressly for a left inferior petrosal sinogram to evaluate the extent of any further venous abnormality. Physical examination performed on admission showed Captain Brou to suffer from no significant abnormality other than the noted venous varix. On April 17, 1968, a left petrosal venous sinogram via the left jugular vein was performed on Captain Brou by Lt. Col. Jorge R. Guiterrez, Medical Corps. In performance of the operation a double

catheter was used. The outer was a 6.3 French in size; the inner a 4.5 French. Renografin-60 was the contrast material used. A test injection of 1 cc. was made initially to determine whether the patient was allergic to the contrast material, and 10 cc. were then used to determine the proper placement of the catheter. Once having determined that the catheter was properly placed, an additional 5 cc. of Renografin-60 was injected while rapid sequence radiographic films were taken. During this procedure, numbness developed on Captain Brou's right side. This condition was immediately recognized and the neurosurgical service was contacted before she left the radiological diagnostic room. During the next 3 hours a right hemiparesis developed. A lumbar puncture was performed, and the fluid proved essentially clear. Captain Brou was initially treated with mannitol and steroids to reduce cerebrospinal fluid and intraoccular pressure. Intravenous heparin therapy was then instituted and Captain Brou's clotting time was controlled at an excess of 20 minutes. Her condition then stabilized and by April 19, 1968, there was slight clearing of facial weakness. On April 20, 1968, the steroid treatment was stopped and treatment with warfarin sodium (Coumadin) was commenced. Due to increased spasticity in the right leg, steroid (Decadron) therapy was again instituted with continuing warfarin sodium. During the first week in May 1968 the steroid and warfarin sodium treatments were discontinued without further adverse effect, and physical therapy was undertaken.

MAY 15, 1970.

CLAIMANT'S AFFIDAVIT

In the summer of 1967 I experienced some blurring of vision in my right eye, and a bulging of the right eyeball when I leaned over or pressed on my neck. I sought relief and advice at Andrews AFB Hospital, and subsequently was referred to the Chief of Neurosurgery at Walter Reed Army General Hospital. I underwent two diagnostic studies, a Venogram and an Arteriogram in December 1967. The Chief of Neurosurgery, Col. Ludvig Kempe, M.D., was in charge of these diagnostic procedures, although the actual performance was delegated to lesser ranking neurosurgeons and radiologists. My symptons were so unusual according to Dr. Kempe and Maj. Darwin Ferry, M.D., that they told me they would document my case for the American Medical Association Journal if I had no objections and would sign a release. At one time, they had me attend a medical staff meeting at which Dr. Ferry demonstrated the bulging of my right eye to the attendees. As I stated previously, both diagnostic procedures performed in late December 1967 were done with radiologists and neurosurgeons in attendance, along with a regular chief technician (female), and several other technicians.

There were no complications, and the procedures gave evidence of a venous occlusion behind my right eye. In the ensuing months after the last test, my vision cleared and I did not want to go through with any further tests. Dr. Kempe called me several times and advised that I should return to Walter Reed Hospital for one more diagnostic procedure just in case I would ever require surgery in the future or if surgery were possible due to an automobile accident, blackout, or cranial injury. This reason did not seem plausible to me at the time, and I demurred. I was in training status on a new job, my vision was

better, and I had apprehensions about going through with another test. I, in fact, consulted a friend of mine, Dr. Martha Lumpkin, about the advisability of continuing these tests. Realizing my apprehensions, she called Dr. Kempe and rediscussed the entire case to ascertain the nature of the test, inherent dangers, and so forth. Dr. Kempe assured her there was no eminent danger, and that it was a simple diagnostic procedure as previously done—no more risk than in a tonsillectomy or appendectomy.

Dr. Kempe called me again in late March or early April 1968, at which time I agreed to reenter the hospital for this last test because I was frightened by what he had impressed upon me that could happen.

I entered the hospital on the evening of April 15, 1968, and on the following day underwent the required examinations, lab work, blood work, and so forth. Examinations and all studies revealed I was in a normal, healthy state. That same evening, Major Guiterrez, M.D. radiologist, called on me to discuss the test, at which time he assured me it would be no different than the two tests administered in December. The next morning I was taken to the diagnostic room, and in full consciousness, noted with surprise that the number of medical personnel was about half those in attendance at the identical tests in December. In particular, I noted the absence of the chief technician. Preparations for the procedure got underway very quickly, and I was caught up in the activity. I recall quite vividly the attending technician cautioning Dr. Guiterrez not to go so fast in his preparations. He also cautioned the doctor during the actual procedure to "slow down and not be in such a hurry," because there were certain things he had to do in concert with the doctor. At this point, after hearing the conversation between the technician and the doctor, I wondered if Dr. Guiterrez were either pre-occupied or in a rush to complete the procedure. I was fully conscious when he injected the contrast material, and immediately felt my right hand draw up into an open clinch position. Concurrently, I felt I could not breathe, and that I was swallowing my tongue. At that moment I told the doctor, "Something has gone wrong—I can't breathe. I need oxygen—I'm swallowing my tongue!" Then I blacked out for what I remember as being a very short time. When I came to, Dr. Guiterrez said, "Do you think we can go on with the second part of this test?" I replied, "No indeed! I need oxygen—I can't breathe. Get Dr. Ferry here immediately—and please get this apparatus out of my neck!" No one was attempting to help me—they seemed completely at a loss, and I distinctly remember using my left hand to dislodge my tongue so I could breathe. Moments later Dr. Ferry arrived, and after hurried consultation with Dr. Guiterrez, I was returned to the ward where Dr. Ferry took over all treatments.

I was placed on the critical list and my family notified. I subsequently became aware that I was completely paralyzed on the right side and, in fact, that I might not pull through; particularly when I realized my mother and sister had flown in from Mississippi and were at my bedside that same night.

I remained in the intensive care unit for approximately 10 days, and in the hospital for about 6 weeks. At no time during this period did Dr. Guiterrez come to see me, which seemed most unusual to me.

On a routine doctor's round by LCOL Hammond (Assistant Chief of Neurosurgery Department), about 3 weeks after the procedure I

queried Dr. Hammond saying words to the effect that now that you have the skull pictures of the test and had time to review them, and now that I am paralyzed, can you tell me what happened? He replied negatively saying that they still didn't know what went wrong. Then I asked why they didn't know, whereupon he replied, "Because you didn't die and we couldn't cut your head open to find out just exactly what did happen." I was terribly shaken by his reply, and the ladies in the two beds next to mine who had overheard the conversation were most upset and almost in a state of shock themselves.

During the ensuing 3½ months, I was treated on a "subsist elsewhere" basis, and on September 19, 1968, I was discharged from the Air Force with a 100 percent permanent disability.

About June 1969, I revisited Dr. Kempe for his assessment and reevaluation of my progress. During the course of this visit I asked him if any further light had been shed on the subject as to what transpired during the procedure that precipitated my paralysis. His reply was indirectly negative; however, he did state that he was very disturbed about what had happened to me as a result of the diagnostic procedure because he had learned subsequently that Dr. Guiterrez had not previously performed one of these procedures, and, therefore, was not familiar with the technique, even though he had claimed he was, before he was assigned to perform the procedure on me.

I don't know why Dr. Kempe elected to tell me this information except that perhaps he felt it his duty. Reflecting in restrospect on this information, I came to the conclusion that this may have had a direct bearing on the unusual absence of Dr. Guiterrez after he had performed the procedure.

Dr. Kempe advised me to exercise my constitutional rights and write a letter to the Chief of the Radiology Department at Walter Reed and request a complete description of the operative procedures performed on me on April 17, 1968. I followed his advice and on August 21 the hospital replied to my letter of June 17. The information requested was not complete in its entirety, but I took no further action at that time.

For the past 2 years I have pursued every possible course of rehabilitation, some of it at my own expense. I even purchased and had installed a swimming pool for therapeutic use since it was recommended as the best possible form of therapy. My right side today is still completely useless, and my right arm dangles grotesquely at my side. The dead weight feels like a bucket of cement hanging from my shoulder. With the aid of a brace fitted into flat heeled, sturdy, unsightly shoes and fastened with a collar under my knee, I can walk—ungainly, stumbling and awkward—but I can walk for short distances on even, firm, and level surfaces.

During one of my subsequent visits to Dr. Kempe, he informed me that I was one case in 20,000 that ended in hemiparesia as a result of a diagnostic procedure such as I received. This information is very disheartening in view of the fact that I and Dr. Lumpkin both had been informed that Walter Reed Hospital had the very best physicians for this type of diagnostic study and they did an average of 4,000 yearly.

I cannot express the severe mental anguish I have suffered from this "accident." Because of my grotesque appearance and the clumsiness caused by damage to the motor function of my brain, I have withdrawn from my friends and the public in general. Unfortunately, I have not

yet grown accustomed to the stares of children and curious adults. The embarrassment caused by stumbling, dropping, and breaking things, and even falling in public is not easy to overcome, especially when accused of being intoxicated.

Before this "accident," I had won several medals for swimming and diving; I owned my own sailboat and campmobile, and I frequently participated in dancing, water and snow skiing, golf, bowling, tennis, and camping. I enjoyed doing many things, including gardening and cooking. I no longer can do any thing requiring physical coordination—in fact, it is very uncomfortable just to sit and read because of the difficulty of trying to hold a book, magazine, or newspaper and turn the pages with one hand, and to cope with double vision in my right eye. I no longer am able to perform the normal activities of daily living nor to maintain a household independently—and I feel I am a burden to my close friends in that I require much the same care as an invalid.

The outlook for return of function in my right side is not bright. I am pursuing every possible course of action, hoping to find somewhere a new procedure or device to help me, but nothing has developed to date.

CLAIRE E. BROU,
*Captain, USAF (retired).*

DISTRICT OF COLUMBIA: This the 18 of May, 1970, subscribed and sworn to by Claire E. Brou, this date.

THOMAS J. LANKFORD, *Notary public.*

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MAY 18, 1970.

My name is Dr. Martha Ray Lumpkin. I practice internal medicine at Seven Corners Medical Building, Falls Church, Va. I am a graduate of Johns Hopkins University Medical School, 1951;

I specialized in internal medicine, and have been in private practice since 1955.

The following concerns my knowledge of the case of Capt. Claire E. Brou, U.S. Air Force.

Captain Brou had been in active Naval and military service 14 years, until September 1968 when she was discharged from the Air Force with total, permanent, 100-percent disability. This disability is due to paralysis of the right arm and right leg that she sustained immediately following an injection of dye at Walter Reed Hospital in April 1968.

I have known Captan Brou for 4 years, 2 years prior to her paralysis and 2 years subsequent. I have known her personally as an excellent skier and water sports enthusiast. She has also been active in golf, camping, tennis, and I considered her to have superior athletic abilities.

In the fall of 1967, Captain Brou was seen at Andrews Air Force Hospital for evaluation of a mild visual problem, which, to my knowledge, she had experienced for a number of years following an automobile accident in 1951. At that time, in 1951, she reportedly sustained a head injury and depressed skull fracture to the left side of her head, for which she was hospitalized several weeks. She had total recovery and returned to full, active military duty thereafterward.

During the past several years, she had on rare occasion noted blurred vision and protrusion of her right eye of a few seconds' duration. This

would occur when leaning over for long periods of time. She had been examined on routine annual physical examinations for this complaint and no abnormality was ever found.

In the fall of 1967, Captain Brou, while on active duty with the Air Force, stationed at Andrews Air Force Base, consulted the base physicians for this episode of blurred vision and protrusion of the right eye. After she had undergone examinations and X-rays, I discussed her rather unusual medical case, in detail, with the same physicians at Andrews Hospital. This included the radiologist, ENT specialists, neurologist, and ophthalmologist. The consensus was (1) that this was probably an abnormal blood vessel behind the right eye that had been present for several years, (2) that this had not permanently affected her vision, (3) that she probably had an enlarged vein or group of veins behind the right eye that would fill up with blood when she leaned over long periods of time and that this pushed the eye forward, giving her only temporary blurred vision and protrusion of the eye that immediately disappeared when she returned to an upright position, and (4) that the only way to be certain that this was the situation which would require no further concern was by certain X-ray studies requiring injection of dye in the arteries and veins of the head, with simultaneous X-rays to visualize and outline these structures behind the right eye. We were informed that such studies were done at Walter Reed General Hospital and arrangements were made for her admission there in December 1967, which was approximately a month later. In the interim, Captain Brou was seen in consultation, at my request, by a prominent local neurosurgeon, Dr. John Bucur, who agreed that he could find no damage to her right eye or any other serious problem and that he was in agreement with the probable diagnosis as stated above. He also felt she had this condition for a number of years, and it required no other treatment than avoiding bending over for long periods of time. However, he felt the X-ray studies should be done to be certain that there was nothing of a more serious nature, such as brain tumor. He expressed the feeling that Walter Reed Hospital was one of the best in performing this procedure and that he knew the staff there personally.

I accompanied Captain Brou to Walter Reed Hospital on several occasions prior to her first admission in December 1967. I discussed her case with Lt. Col. Ludvig Kempe, chief of neurosurgery. He was extremely interested in Captain Brou's case and indicated this was a rare and unusual case. After an office examination of Captain Brou in November 1967, prior to her admission in December, he indicated to me that he agreed with the concensus of physicians at Andrews Hospital that there was probably a large vein behind her right eye that had been present since her old head injury in 1951. He indicated that he felt the injury to the left side of her head may have caused blocking of the veins on the left side, thereby causing compensating enlargement of the remaining veins on the right side of the head. This would explain the enlarged veins behind the right eye which caused the protrusion in the bending-over position. He advised that she needed X-ray studies to be certain, and that nothing more would be necessary if this were the case. However, she would have to avoid leaning over and deep under-water swimming.

Captain Brou was admitted to Walter Reed in December 1967 for both arteriogram and inferior petrosal sinogram. She was in the hos-

pital approximately 10 days during these extensive examinations. With her permission, she was photographed and her case was presented to a large group of physicians, including Dr. Walsh, professor emeritus at Johns Hopkins, known worldwide in the field of neuro-ophthalmology. Captain Brou estimated the group included over 100 physicians in this seminar.

Following the above studies, Dr. Kempe informed Captain Brou and me that the X-ray had definitely shown she had only a large venous varix, which is similar to a varicose vein, behind the right eye and no further problems were found. She was discharged with no further treatment or studies recommended, other than the previous advice Dr. Kempe had given us.

About 4 months later, in April 1968, Captain Brou informed me that Dr. Kempe had recently called her at work on three different occasions requesting that she return to Walter Reed Hospital for further X-rays. She had a good deal of apprehension, did not want to have any further X-rays, and asked me to call Dr. Kempe and discuss with him why the necessity for further X-rays. I telephoned Dr. Kempe and discussed, in some detail, the reservations that Captain Brou felt about returning for further X-rays since her condition did not require any further diagnosis or treatment. Dr. Kempe stated that there was little to no risk involved in the procedure that they contemplated, which was an inferior petrosal sinogram on the left side of the head. He stated, in essence, that she had had no difficulty with the tests on her previous admission when it was done on the right side, that this was a rather routine procedure, that they did approximately 4,000 a year, and assured me there was no danger involved.

I related this information to Captain Brou. However, I still felt that this was an unnecessary procedure, even if Dr. Kempe felt that there was no risk involved. Captain Brou indicated to me that in the military one does not have quite the freedom of refusal of a superior medical officer when requested to have such studies performed. In light of the conversation with Dr. Kempe and her feeling that she could not refuse this request, I advised her to proceed, even though I felt it was an unnecessary procedure.

I accompanied Captain Brou to the hospital on April 15 for a supposedly 24- to 48-hour admission. She was in uniform and was to return to duty within the next few days. The morning of April 17, I called to see if Captain Brou was ready for release from the hospital and if I could come get her. Dr. Ferry informed me over the telephone that something had gone wrong with the X-ray procedure that morning and Captain Brou was paralyzed and in serious condition. I immediately rushed to the hospital and found that Captain Brou was on the critical list. She was paralyzed on her right side; she had slurred speech; and was beginning to have visual problems; and was trying to tell me what had happened during the procedure. In the meantime, her sister and mother had been notified in Ocean Springs, Miss., by the hospital that she was in critical condition.

Captain Brou informed me within 2 to 3 hours after the procedure that the radiologist, Dr. Guiterrez, had done the procedure very rapidly, that during the procedure he was cautioned to slow down, that during the procedure she had a convulsion, and then she noticed that she had no use of her right hand and later right leg, and that she

was swallowing her tongue. At this point, they had called Dr. Ferry, who had not been present. I remained with Captain Brou at her bedside for approximately 12 hours. I discussed her case with Dr. Kempe later that day, and he and Dr. Ferry both were under the impression that this was a temporary situation and that she would probably be all right within 24 hours. They thought that she had just had blood vessel spasm to that part of the brain and that this would disappear. They seemed rather shocked at the turn of events. Later that same afternoon, Dr. Kempe was discussing Captain Brou's case with approximately six or seven other physicians in his office when I arrived to talk to him. He allowed me to hear the entire conversation. My impression at this time was that they were not sure what had happened, or what had gone wrong. In essence, they would have to just "wait and see" if the paralysis would disappear. Dr. Guiterrez, to my knowledge, was not in the room, since questions were asked about the procedure and no one could answer them. I never saw Dr. Guiterrez during the subsequent 6 weeks she was in the hospital, and, to my knowledge, he never visited her during the rest of her hospital stay. Captain Brou continued the first 24 hours to have a steady downhill course, with increasing paralysis, following the procedure. As her condition worsened, it became apparent that this was not going to be a temporary situation. Dr. Kempe again discussed it with me briefly the following morning, but there was no explanation as to what had gone wrong.

Captain Brou remained in critical condition approximately 10 days. Thereafter, she was transferred to an open, 18-bed neurosurgical ward for the balance of 6 weeks' hospitalization. She was unable to do anything for herself, being totally paralyzed on her right arm, right leg, speech defect, hearing loss, and double vision. She started back on the road of long recovery with physical therapy in a wheelchair.

At the end of 6 weeks on an open, 18-bed ward, Captain Brou was unable to return to her home where she lived alone in a three-story house. Walter Reed informed here that she had to go and subsist elsewhere, that they needed the bed. She was still on active duty at the time and the service withdrew quarters allowance while she was in the hospital, which I understand is not a routine practice. To my knowledge, no provision had been made to help Captain Brou in obtaining a livable home, which, at the present time, would require a one-floor dwelling and someone to help her in ordinary maintenance of a house and activities of daily living.

I am of the opinion that her present condition is a permanent one and that she will require the above assistance for the rest of her normal life expectancy. She made some progress with her physical therapy during her first year and was retrained to walk, eat, use her left hand, and drive a fully powered, automatic-shift automobile. Though there was some progress shown in the first year of her paralysis, there was no additional progress made the second year of therapy. At this time, she has no use of her right arm, she walks with difficulty in a short leg brace, and the prognosis for any further recovery is negative. She still needs someone to assist with the daily routine of household chores.

MARTHA RAY LUMPKIN, M.D.

DISTRICT OF COLUMBIA: This the 18th of May, 1970, Subscribed and Sworn to By Martha Ray Lumpkin, M.D., this date.

THOMAS J. LANKFORD, *Notary Public.*

CLINICAL RECORD AND NARRATIVE SUMMARY—APRIL 15, 1968

MILITARY HISTORY

The patient is a U.S. Air Force captain. She has served as an officer in the U.S. Navy from 1958 through October 1967 and has been on active duty in the Air Force from October 1967 until the present time.

SOCIAL AND FAMILY HISTORY

The patient consumes alcohol in moderation and does not smoke. She takes thyroid extract, 2 grains at night, and takes estrogen tablets, one daily. The patient's father died of a heart attack at 53 years of age. There are no other heredofamilial illnesses.

PAST MEDICAL HISTORY

The patient had the usual childhood illnesses without sequelae. She had a right Bell's palsy in 1963; an appendectomy at 12 years of age; dilatation and curettage in 1965; and a right inguinal herniorrhaphy in 1965 and 1966. She had a fracture of the left perietal temporal bone in 1951. She has no known allergies.

REVIEW OF SYSTEMS

The patient's general health is good. She has had menstrual irregularity for which she has been receiving hormonal therapy, with good results. She states that she has had bursitis in both shoulders.

CHIEF COMPLAINT

The patient was admitted to the neurosurgical service at Walter Reed General Hospital on April 15, 1968, for vascular contrast studies to evaluate vascular malformation behind the right eye.

HISTORY OF PRESENT ILLNESS

This 40-year-old Caucasian female, active duty U.S. Air Force captain has a several-year history of bulging of the right eye when bending over or upon valsalva maneuver. In December 1967, she was admitted to the neurosurgical service, Walter Reed General Hospital, where a retrograde right petrosal sinogram was performed, revealing a venous varix in the right orbit behind the right globe. The patient notices no problems with pain or diplopia in the morning, but has occational blurring of vision as the day proceeds. She is admitted now, expressly for a left inferior petrosal sinogram to evaluate the extent of the venous abnormality. It is noted that she had a depressed left frontotemporal skull fracture in 1951 with a subsequent craniectomy.

PHYSICAL EXAMINATION

Height, 5 feet 5½ inches; weight, 145 pounds; temperature, 98.2; pulse, 72; blood pressure, 128/80. The patient was a well developed, well nourished, Caucasian female who was alert, cooperative, oriented and in no apparent distress. Examination of the head and neck re-

vealed the left eye to bulge when the patient bent forward and valsalvas, or when there was fibular compression. The remainder of the head and neck examination was within normal limits. The chest was clear to auscultation and percussion. The heart had a regular sinus rhythm without murmurs or thrills. The breasts were normal to palpation. The abdomen was soft and nontender, without masses or visceromegaly. There was a right inguinal groin scar. Pelvic and rectal examinations were normal. Examination of the back and extremities was normal. Cranial nerve inventory was intact with a notation that there was slight weakness of the right VII, cranial nerve. Strength and coordination were normal in the extremities. Gait and station were normal. Deep tendon reflexes were 2 plus, bilaterally equal. No pathological reflexes were noted. Sensory examination was normal. The remainder of the physical examination and neurological inventory were within normal limits.

### LABORATORY AND X-RAY DATA

Admission chest X-ray was negative. Brain scan on April 17, 1968, was normal; on April 19, 1968, normal and on May 7, 1968, normal. X-rays of the left shoulder on May 16, 1968, were reported as within normal limits. Admission urea nitrogen was 5 mg. percent; fasting blood sugar, 88 mg. percent; WBC, 11,300 with 55 percent neutrophils, 2 percent bands, 29 percent lymphocytes, 5 percent monocytes, 8 percent eosinophils and 1 percent basophils. Hematocrit was 37. Admission urinalysis showed a specific gravity of 1.017 with negative albumin and sugar. Urinary sediments were normal on microscopic examination. Serum electrolytes on April 18, 1968, $CO_2$ combining power, 35; chlorides, 102; sodium, 132; potassium, 3.7 milliequivalents per liter; 2-hour postprandial blood sugar, 109 mg. percent; cerebrospinal fluid on April 17, 1968, was reported as showing 2 cell per cubic mm., 100 percent lymphocytes. Many RBC's were noted. No increase in protein. Sugar on that specimen was 80 mg. percent; chlorides, 124 milliequivalents per liter; total protein, 31 mg. percent. Cerebrospinal fluid culture was negative. Cardiolipin microflocculation test was nonreactive. Multiple prothrombin times were obtained during the patient's hospital range during the period noted. Electroencephalogram on April 16, 1968, was within normal limits.

### COURSE IN THE HOSPITAL

The patient was admitted to the neurosurgical service expressly for a left inferior petrosal sinogram and evaluation of a right retrobulbar intraorbital vemous varix previously diagnosed. Accordingly, on April 17, 1968, the patient was taken to the diagnostic room where, under local anesthesia, a left inferior petrosal sinogram was performed. Following a second injection of contrast material, the patient developed a right hemiparesis and tingling into the right hemicorpora. In addition, she developed diminished sensation in the right face, in the right second and third divisions of the fifth cranial nerve. She had nystagmus on left lateral gaze with a left sixth nerve palsy. She had headache and a stiff neck. Lumbar puncture was performed and the fluid was essentially clear. She was treated with mannitol and steroids. Intravenous heparin therapy was instituted and the patient's clotting time

controlled at an excess of 20 minutes. Her condition stabilized and by April 19, 1968, there was slight clearing of the right facial weakness. Physical therapy was instituted. On April 28, 1968, the decadron was stopped, as well as the steroids and coumadin therapy was initiated. Within 24 hours, there was noticeable increase in spasticity in the right leg and some diminished strength. Accordingly, decadron therapy was again instituted with continuing coumadin. Coumadin therapy was maintained with the prothrombin time at 2½ times normal. The first week of May 1968, both decadron and coumadin were withdrawn without any further deterioration. The patient was subsequently given convalescent leave. On July 24, 1968, the patient was examined and found to be ambulatory with a short-leg brace with a spastic right hemiparesis. She had essentially no function in the right upper extremity which is her dominant extremity other than slight flickers of motion at the thumb and small finger. There was good strength of motion at the right hip with essentially no affective strength below this level against gravity. The patient manifests extensor spasticity in the lower extremity and flexor spasticity in the upper extremity of a moderate intensity. In addition, there was mild contracture at the right shoulder. The patient had hyperreflexia of the right extremities with nonsustained clonus at the ankle and knee, fingers and wrist. Hyperreflexia was noted in the deep abdominal muscles on the right, as well as in the right extremities. Hyperreflexia was noted in the right facial muscles. The patient had a partial left sixth nerve palsy and a spastic right central seventh palsy was noted. In addition, she had diminished position and vibratory sensation in the right hemicorpora. A right Babinski sign was noted. Medical Board proceedings were subsequently instituted.

CONSULTATIONS

Department of Gyn was consulted on April 16, 1968. It was noted that the patient had a history of irregular menstrual periods and was on cyclic therapy. Impression was istrogenic menometrorrhagia, secondary to continuing estrogen therapy. Recommendation: Discontinue all hormonal therapy, estrogen, progesterone and so forth, menstrual calendar and re-evaluated at a later date of resurrent problem. Papanicolaou's smear was done. Pelvis examination was reported as within normal limits. Department of Physical Therapy was consulted on April 19, 1968 for passive range of motion exercises of the right extremities. Department of Ophthalmology was consulted on May 1, 1968 and their impression was right seventh nerve palsy, complete left sixth nerve palsy, partial left first division fifth nerve palsy, most probably secondary to corneal ulceration. The ENT Service was consulted on May 7, 1968 for impression of hypacusis and the following diagnoses were made: (1) Hypacusis, high frequency, bilateral, moderate probably secondary to acoustic trauma and not related to present problem; (2) Normal hearing speech frequencies. Disposition: H–2 profile without limitations. Electroencephalogram on May 7, 1968 was reported as an abnormal record with left temporal focus. Orthopedic consultation was obtained on May 22, 1968 for the complaint of tenderness in the left shoulder. Impression was localization and the symptoms produced in abduction and external rotation would suggest a subacrominal bursitis. The X-rays were negative. They recomended that

the patient be referred to physical therapy for ultrasound treatment to the area together with circumduction exercises in the pendulum position. Ophthalmology department was consulted again on June 23, 1968. Vision on this day was right eye, 20/30; left eye, 20/25; corneal sensitivity was normal in both eyes. Examination revealed improving left sixth nerve palsy now with the pupil swinging to 60 degrees lateral to the midline.

PRESENT CONDITION

The patient presently has a right hemiparesis with essentially nonfunctioning dominant right upper extremity. She is ambulatory with a grotesque limp and a short-leg brace. She has double vision, secondary to her left sixth nerve palsy which necessitates her wearing an eye patch. In addition, she has a spastic right facial nerve with frequent facial grimacings, as well as drooling at the corner of the mouth. She has inability to perceive position of the right extremities, both upper and lower.

DIAGNOSES

1. Cerebrovascular accident of brain stem, secondary to left inferior petrosal sinogram, manifested by spastic right hemiparesis, loss of vibratory sensation and position sense in the right hemicorpora, right seventh nerve palsy, and left sixth nerve cranial palsy. LOD: Yes
2. Right retrobulbar intra-orbital venous varix. LOD: Yes

RECOMMENDATIONS

It is noted that this patient's hemiparesis involves her dominant extremities. It is therefore recommended that she be referred to an Air Force Physical Evaluation Board for further disposition.

COMMITTEE CONSIDERATION

The Department of the Army in its report expresses great sympathy for the tragic circumstances in which Captain Brou finds herself but recommends against the enactment of this legislation. The Department of the Army in its report states in part as follows:

> Department of the Army records reveal no evidence of misfeasance or negligence on the part of Army personnel in the performance of the above diagnostic procedure or during subsequent treatment. Even if such evidence were revealed by the records, Captain Brou would be barred from filing a claim against the United States for injuries under the doctrine of *Feres, et al.* v. *United States* (340 U.S. 135 (1950)). In the *Feres* case the Supreme Court held that no claim would lie under the Federal Tort Claims Act, title 28, United States Code, section 2672 *et seq.*, if the injury arose out of, or in the course of, activities incident to the claimant's active service.

In reading the affidavits of the claimant and her doctor and studying them in connection with the clinical record and the Army report, there appears to be a definite division as to the question of misfeasance or negligence. The committee will deal with this element of the claim later in this report. As to the holding in the *Feres* case, the committee does not quarrel with the decision and realizes that it is the law. However, it must be remembered that this is a petition for redress of grievances by a citizen of the United States under the first amendment to the Constitution of the United States which provides for the petition-

ing of the Government for a redress of grievances. Article I, section 8 of the Constitution provides the manner in which the Congress shall pay the debts of the United States along with other related matters. Therefore this bill constitutes an appeal to the United States for the redress of grievances which has no remedy at law. The question therefore arises is this such a situation in which the Congress of the United States should take action.

In construing section 8 of article 1 of the Constitution in the case of the *United States* v. *Realty Company*, 163 U.S. 427, the Supreme Court held in part as follows:

> Under the provisions of the Constitution (article 1, section 8), Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The Nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the Government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the Government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution.

As noted, *Realty* recognizes the right and power of the Congress to adjudicate and settle this type of claim, not of a merely legal nature but payments in a nature of a gratuity having some feature of a moral obligation or upon considerations of pure charity. It also states that

a debt of merely an honorary nature which is binding upon the conscience or honor of an individual, although the debt could obtain no recognition in a court of law, nevertheless falls under the classification of a debt which can validly be considered by the Congress. The Court further states that the Nation speaking broadly owes a debt to an individual when a claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, even though the debt could obtain no recognition in a court of law. This has been done ever since the adoption of the Constitution.

Leaving out the legal question is there such an obligation upon the Government of the United States to redress the grievances of this individual?

To refer back to the *Feres* case, it will be noted in addition to *Feres* there was decided in that case two other cases, *Jefferson* v. *United States*, and *United States* v. *Griggs, Executrix*. The opinion of the Court in the *Jefferson* and *Griggs* cases held the same as it did in *Feres*. In the *Jefferson* case the Court said:

> Plaintiff, while in the Army, was required to undergo an abdominal operation. About 8 months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked "Medical Department U.S. Army" was discovered and removed from his stomach. The complaint alleged that it was negligently left there by the army surgeon. The District Court being doubtful of the law, refused without prejudice the Government's pretrial motion to dismiss the complaint. After trial, finding negligence as a fact, Judge Chestnut carefully reexamined the issue of law and concluded that the act does not charge the United States with liability in this type of case. The Court of Appeals, Fourth Circuit, affirmed.

These decisions are cited by the Department of the Army in its report that under the law no claim would lie under the Federal Tort Claims Act if the injury arose out of, or in the course of, activities incident to the claimant's active military service.

Subsequent to the ruling in the *Feres* and *Jefferson* cases there was introduced in the Congress of the United States a bill for the relief of Mr. Jefferson being S. 1143 of the 84th Congress. The Committee on the Judiciary of the Senate reported this bill to the Senator favorably in the sum of $7,500 on the 23rd of April 1956 and the bill passed the Senate on the 30th day of April 1956. No action was taken in the House of Representatives. The Senate Report on S. 1143 84th Congress deals extensively with the facts in the case as well as the statements of Judge Chestnut and the action of the Circuit Court of Appeals in the Jefferson case. For the full information of the Committee and the Senate in regard to this line of cases, Senate Report No. 1805 on S. 1143 is set forth in full.

[S. Rept. No. 1805, 84th Cong., second sess.]

> The Committee on the Judiciary, to which was referred the bill (S. 1143) for the relief of Arthur K. Jefferson, having

considered the same, reports favorably thereon, with an amendment, and recommends that the bill as amended do pass.

AMENDMENT

On page 1, line 6, strike out the figures "$20,000" and insert in lieu thereof the figures "$7,500".

PURPOSE

The purpose of the proposed legislation, as amended, is to authorize and direct the Secretary of the Treasury to pay out of any money in the Treasury not otherwise appropriated, to Arthur K. Jefferson, of Baltimore, Md., the sum of $7,500, for compensation for permanent injuries sustained by him as the result of an operation performed on him on July 3, 1945, at the Fort Belvoir Hospital, Va., while a member of the United States Army, in which a United States Army Medical Department towel was negligently left in his stomach until discovered and removed during a subsequent operation on March 13, 1946.

The bill further provides in sec. 2 that the sum appropriated by this act to the said Arthur K. Jefferson shall be in addition to any benefits to which he is entitled under the laws providing benefits for veterans.

STATEMENT

The Department of the Army, in its report, states that while deeply regretting the fact that the claimant incurred disability while in the military service, is obliged to recommend that this bill be not favorably considered by the Congress, and refers to its report on H.R. 4329 of the 83d Congress, for the relief of Arthur K. Jefferson.

It is believed that the completeness of the Army report is such that the facts therein should be set out verbatim and in full at this point:

"The records of the Department of the Army show that Arthur K. Jefferson, who had been an aviation mechanic at the Glenn L. Martin Co., enlisted in the Army of the United States on October 22, 1942, and was assigned Army Serial No. 13135713; that at the time of his enlistment he was 45 years of age; that he had previously had an abdominal operation for appendicitis from which he had apparently recovered; that about 5 months after enlisting, and while in the Army, an abdominal operation was performed on him in an Army hospital at Indiantown Gap, Pa., during which one of his kidneys was removed; that from January 19, 1943, to May 17, 1943, he had various medical complaints diagnosed as hydronephrosis; that a subsequent diagnosis of herpes of the lower lip was reported cured on February 7, 1943; that on February 19, 1943, a further diagnosis of this soldier indicated pleurisy, which was reported cured on March 3, 1943; that from February to April 1945 he had an ill-defined condition of the

gastrointestinal system, including vomiting, with nonfunctioning gall bladder; that on July 3, 1945, he was operated on for cholecystostomy in the Army hospital at Fort Belvoir, Va., by the chief surgeon at said hospital, and that he was honorably discharged from the Army on January 9, 1946.

"A few days after his discharge from the Army Mr. Jefferson filed a formal application with the Veterans' Administration for compensation on account of service-connected disability. On March 18, 1946, the Veterans' Administration awarded to the claimant disability compensation in the amount of $34.50 per month, retroactively to January 10, 1946 (the day following the date of his discharge from the Army), upon a service-connected disability rating of 30 percent on account of the surgical removal of a kidney while he was in the military service.

"Around the end of February 1946 Mr. Jefferson began to suffer from vomiting spells and nausea, which grew increasingly more severe until March 8, 1946, when he went to the Johns Hopkins University Hospital in Baltimore, Md., for treatment. On March 13, 1946, he was operated on at said hospital. The operating surgeon found a well-healed medical scar in the front of the abdomen, through which he operated. During the course of such operation the surgeon found a towel in the lower part of Mr. Jefferson's stomach which had partly worked into the duodenum. The towel was removed, measured and photographed. It was 30 inches long by 18 inches wide and was marked "Medical Department U.S. Army." After this operation Mr. Jefferson was treated at the United States Marine Hospital in Baltimore, medically and surgically. It was found that he had sustained a serious hernia, which was attributed to the aftereffects of the operation performed on him at the Johns Hopkins University Hospital and thought to have been caused by inflammation or infection as a postoperative result of the removal of the towel.

"The Department of the Army has been advised by the Veterans' Administration that on June 7, 1946, the compensation of Mr. Jefferson was increased to $115 per month, retroactively to January 10, 1946 (less the prior payments that had been made to him at the rate of $34.50 per month), upon a disability rating of 100 percent. In a letter to the Department of the Army, dated July 22, 1953, the Veterans' Administration further advised with respect to this claimant as follows:

" 'The veteran's compensation was increased from $115 to $138 monthly from September 1, 1946, under Public Law 662, 79th Congress, and further increased to $159 monthly from September 1, 1948, under Public Law 877, 80th Congress, which legislation authorized the payment of additional compensation for his wife. Under Public Law 339, 81st Congress, his payments were increased to $171 monthly from December 1, 1949. They were reduced to $150 monthly from September 14, 1951, on account of the death of his wife, and

increased to $171 monthly from March 6, 1952, on the basis of remarriage. His compensation was further increased to $193.50 monthly effective July 1, 1952, under Public Law 356, 82d Congress, and he is being paid this monthly rate of compensation at this time. Estimated from the awards in file, this veteran is shown to have received compensation to date of approximately $14,000.'

"In September 1947 Mr. Jefferson filed a suit against the United States in the United States District Court for the District of Maryland (civil action No. 3692 in which he prayed for a judgment against the Government under the Federal Tort Claims Act in the amount of $100,000 and costs for the damages sustained by him as the result of a towel having been left in his abdomen at the time he was operated on in an Army hospital on July 3, 1945. After a trial of this case on the merits the district court dismissed the suit on the ground that the United States was not liable in damages under the Federal Tort Claims Act in a suit of this character for service-connected injuries sustained by a member of the Armed Forces of the United States (*Jefferson* v. *United States*, 77 F. Supp. 706). The district court in its opinion on the case held, in pertinent part, as follows (p. 711): "'* * * the Federal Tort Claims Act does not cover this case of the plaintiff because it was a service-connected disability occurring while the plaintiff was an enlisted man in the United States Army and occurring as a result of negligence on the part of employees of the Government at the hospital.'

"The decision of the district court dismissing the suit of Mr. Jefferson was affirmed by the United States Court of Appeals for the Fourth Circuit (*Jefferson* v. *United States*, 178 F. 2d 518). The Supreme Court of the United States granted a writ of certiorari to review the decision in this case. It also granted writs of certiorari to review the decisions of other lower Federal courts in two other cases brought under the Federal Tort Claims Act for damages on account of the death of two servicemen, who allegedly lost their lives as the result of negligence on the part of military personnel while in the performance of their official duties. The three cases were heard together and disposed of in the same opinion by the Supreme Court (*Feres* v. *United States*, 340 U.S. 135). The Supreme Court, in holding that no recovery could be had in any of said cases, said (pp. 144–146):

"'No federal law recognizes a recovery such as claimants seek. * * *

"'This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. * * *

"'A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage. * * * The compensation system, which nor-

mally requires no litigation, is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely favorably with those provided by most workmen's compensation statutes. * * *

" 'We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by Federal law. We do not think that Congress, in drafting this act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.'

"The compensation benefits that have been and are now being paid by the Veterans' Administration to Mr. Jefferson are not negligible or niggardly," but are substantial. Informal advice received by this Department from the Veterans' Administration indicates that veterans' compensation at the rate of $193.50 per month as indicated in that Administration's letter of July 22, 1953, was continued through September 30, 1954; that, on October 1, 1954, the rate was increased to $202 per month, which Mr. Jefferson is currently receiving; and that the benefits paid to him through March 31, 1955, total approximately $18,000. The life expectancy of the average man of his age is 16 years. If Mr. Jefferson lives that long, he will have collected from the United States, on account of his service-connected disabilities, compensation aggregating at least $56,000.

"In the light of the foregoing facts and the authorities herein cited, there is no legal or equitable basis for the granting of any additional compensation to this claimant on account of the disabilities incurred by him while he was in the Army. His original Veterans' Administration disability rating of 30 percent was increased to 100 percent, obviously as the result of the operation performed upon him on July 3, 1945, at Fort Belvoir, Va. The enactment of the present bill granting to him a special award of $20,000, in addition to the compensation which he has received, is now receiving and will continue to receive from the Veterans' Administration, would be highly discriminatory in that it would grant to this claimant a special benefit which is denied by general law to all other former servicemen in like circumstances."

It is noted by the committee that this matter was the subject of a suit in the United States District Court for the District of Maryland, the United States Court of Appeals for the Fourth Circuit and the Supreme Court. A copy of the decision in the circuit court of appeals is attached hereto and made a part hereof. It is further noted that in that decision the court states as follows:

"It was found by Judge Chesnut at the trial in the district court, (77 F. Supp. 706), that a towel used during an opera-

tion had been left in a surgical wound through the negligence of Government employees at the hospital, and in consequence the plaintiff had suffered serious injuries for which $7,500 would be an appropriate verdict if the case were tenable. The judge held, however, that the statute was not intended to cover claims by members of the Armed Forces of the United States for service-connected injuries suffered while in service. He, therefore, dismissed the case on motion of the United States and this appeal followed."

The exact words of Judge Chesnut, in relation to this matter, appear in 77 Federal Supplement 710, and are as follows:

"From the evidence as a whole, despite the factual difficulties and uncertainties, I conclude that the facts justify the finding that the towel must have been placed in the plaintiff's abdomen or stomach at the time of the operation at Fort Belvoir as alleged; and the failure to remove it before closing the surgical wound was negligence on the part of agents or employees of the Government at the hospital. There was no evidence of any abdominal operation on the plaintiff other than those mentioned; and it is highly improbable that the towel could have been left in the plaintiff at the time of the kidney operation.

"I conclude also that if the plaintiff is entitled to recover at all in this case the actual and prospective payments made to him by the Veterans' Administration must be, as conceded by plaintiff's counsel, treated as diminution of the amount of the verdict; and in view of all the evidence in the case, including the plaintiff's various medical and surgical disabilities preceding the operation at Fort Belvoir, I would conclude that presently a sum of $7,500 would be an appropriate verdict.

"However, I conclude as a matter of law and for the reasons now to be stated, that the Federal Tort Claims Act does not cover this case of the plaintiff because it was a service-connected disability occurring while the plaintiff was an enlisted man in the United States Army and occurring as a result of negligence on the part of employees of the Government at the hospital."

The circuit court of appeals then went on to affirm the decision of the United States District Court for the District of Maryland.

The committee considered favorably what is believed to be ample precedent for the favorable consideration of this bill in two bills in the 83d Congress. The first was for the relief of Curtis W. Strong, being H.R. 3725, 83d Congress, which was approved by the President and became Private Law 418, 83d Congress, and the second was H.R. 5436, 83d Congress, for the relief of David Hanan, which was approved by the President and became Private Law 504, 83d Congress.

The committee after review of all of the foregoing, as a matter of law, is in agreement with the court decisions in this matter, but believes that as an equitable or honorable proposition some measure of recovery should be accorded this

claimant. Unquestionably, the leaving of the towel in the open wound and sewing it in amounts to gross negligence for which, as far as the committee knows, other than by congressional relief, there is no recompense to be had. The committee is further of the conviction that there is an obligation to the claimant, and in view of the finding of Judge Chesnut while the case was before the United States district court, the committee is constrained to recommend that this claimant be reimbursed in the sum of $7,500 as suggested by Judge Chesnut, assuming the action to have been tenable and, therefore, recommends that S. 1143, as amended be considered favorably.

"UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

"No. 5815

"ARTHUR K. JEFFERSON, APPELLANT, *v.* UNITED STATES OF AMERICA, APPELLEE

"APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE—CIVIL

"(Reargued November 8, 1949. Decided December 19, 1949)

"Before PARKER, SOPER, and DOBIE, Circuit Judges

"Morris Rosenberg (Robert H. Archer, Jr., on brief) for appellant, and Morton Hollander, attorney, Department of Justice (H. G. Morison, Assistant Attorney General; Bernard J. Flynn, United States attorney; James B. Murphy, assistant United States attorney; Paul A. Sweeney and Massillon M. Heuser, Attorneys, Department of Justice, on brief) for appellee.

"SOPER, Circuit Judge:

"This suit was brought by a member of the Armed Forces of the United States under the Federal Tort Claims Act (28 U.S.C.A. sec. 2674 et seq.), to recover for personal injuries resulting from a surgical operation performed by an Army surgeon at Fort Belvoir, Va. It was found by Judge Chesnut at the trial in the district court (77 F. Supp. 706), that a towel used during an operation had been left in a surgical wound through the negligence of Government employees at the hospital, and in consequence the plaintiff had suffered serious injuries for which $7,500 would be an appropriate verdict if the case were tenable. The judge held, however, that the statute was not intended to cover claims by members of the Armed Forces of the United States for service-connected injuries suffered while in the service. He therefore dismissed the case on motion of the United States and this appeal followed.

"In the meantime, the Supreme Court, upon an appeal from this court, rendered its decision in *Brooks* v. *United States* (337 U.S. 49), in which it held that two soldiers riding in their own automobile while on leave were entitled to recover for injuries received when they were struck by a United States Army truck driven by a civilan employee of the Army. That decision established that members of the Armed Forces of the United States can recover under the Federal Tort Claims Act for injuries not incident to their service, but left open the question whether the statute also covers claims by servicemen for injuries incident to their service. The Court said (pp. 52–53):

" 'The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an Army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' Army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context to *Dobson* v. *United States* (27 F. 2d 807), *Bradley* v. *United States* (151 F. 2d 742), and *Jefferson* v. *United States* (77 F. Supp. 706), have any relevance. (See the similar distinction in 31 U.S.C. sec. 223b:) Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson* v. *Suwannee Fruit & Steamship Co.* (336 U.S. 198). The Government fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.'

"Since this decision was rendered, the question not decided by the Supreme Court has been considered in the second and tenth circuits which came to opposite conclusions. In *Feres, Ex'r* v. *United States* (2 Cir., decided November 4, 1949), it was held that the estate of an Army officer killed in a fire in unsafe Army barracks in which he had been quartered through the negligence of superior officers was not entitled to recovery for his death; but in *Griggs, Ex'r* v. *United States* (10 Cir., November 16, 1949), it was held that the estate of an Army officer could recover under the act for his wrongful death caused by the negligence of members of the Army Medical Corps while he was under medical treatment. The second circuit based its decision largely upon the provision which Congress has made for military persons in the form of disability payments and pensions. The tenth circuit found more persuasive the broad language of the statute and the fact that Congress failed to except service-connected injuries of

military personnel although bills containing such exceptions had been presented for its consideration.

"We are in accord with the conclusions reached by the second circuit. The choice lies between a literal interpretation of the act and a construction which recognizes the peculiar relationship that exists between a member of the armed services and superior military authority. Congress was plainly impressed with the large number of justified complaints on the part of persons injured through the negligence of employees engaged in the manifold activities of the Federal Government, and found it desirable to modify the Government immunity from suit and to give relief to injured persons through the procedure of the courts rather than through private statutes which burdened the legislative branch of the Government and caused delay in the consideration of complaints. Hence the Federal Tort Claims Act was passed. It seems unreasonable, however, to conclude that Congress, while accomplishing these desirable purposes, intended at the same time to subject every injury sustained by a member of the Armed Forces in the execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the Armed Forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded measures or to the statement of legislators in the course of debate. *Order of Conductors* v. *Swan* (329, U.S. 520, 529), *Jewell Ridge Corp.* v. *Local* (325 U.S. 161, 168).

"This conclusion is fortified by the considerations enumerated and relied on in the opinion of Judge Chesnut and that of the second circuit in the Feres case. The distinctively Federal character of the Government-soldier relationship is recognized in *United States* v. *Standard Oil Co.* (322 U.S. 301, 305), where the extent to which State law may govern the relationship between military personnel and persons outside the Military Establishment was contrasted with the complete subjection to Federal authority of the relationship between persons in the military service and the Government itself. That State law governs in suits under the Federal Tort Claims Act is shown by the provision that the United States is liable for injuries caused by the negligence of a Government employee acting within the scope of his employment under circumstances where a private person would be liable to the claimant under the law of the place where the act of omission

occurred; but it is not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the Military Establishment to the law of negligence as laid down by the courts of the several States.

"The serviceman is not left without protection by the interpretation of the statute, for as pointed out in the opinion of the district court (76 Fed. Supp. 711, note 1), Congress has long had in mind the peculiar dangers to which the military man is exposed, and has accordingly made elaborate provisions for pay and allowances and retirement benefits for persons in the Army and the Navy, in addition to medical and hospital treatment, which are always available. An analogous situation in suits by seamen against the United States under the Public Vessels Act led the court to decide that the permission granted to persons to libel the United States in personam for damages caused by the negligent handling of a public vessel refers to damages suffered by third persons but not by members of the ship's company. *Dobson* v. *United States* (2 Cir., 27 F. 2d 807); *Bradey* v. *United States* (2 Cir., 151 F. 2d 742).

"Affirmed."

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"UNITED STATES SENATE,
"*December 30, 1955.*

"Hon. HARLEY M. KILGORE,
"*Chairman, Committee on the Judiciary,*
"*U.S. Senate, Washington, D.C.*

"DEAR SENATOR: On February 21, 1955, I introduced Senate bill 1143, for the relief of Arthur K. Jefferson, whose claim arises out of the fact that Army doctors during an abdominal operation left a towel 2½ feet long by 1½ feet wide, bearing the legend, "Medical Department U.S. Army," in Jefferson's stomach. As a result of this negligent act, Mr. Jefferson's health has been permanently impaired.

"Section 131 of the Legislative Reorganization Act of 1946 bans the introduction of private bills in Congress over which Federal courts have jurisdiction under provisions of the Federal Tort Claims Act. In this instance, however, the Federal courts have determined that they do not have jurisdiction over Jefferson's claim under the Tort Claims Act (see *Jefferson* v. *United States*, 77 Fed. Sup. 706, 178 Fed. 2d 518, 340 U.S. 135).

"During recent years, Congress has considered several claims similar to Jefferson's involving the negligence of military surgeons in leaving various articles in patients during operations, and a mere statement of the circumstances forming the basis of the claim, in my opinion, is sufficient to indicate that Jefferson is entitled to relief. But for the lack of jurisdiction, Jefferson would have recovered in the district court. In connection with the equities of this particular claim, Judge

Chesnut as dictum in *Jefferson* v. *United States* (77 Fed. Sup. 706, at 710) stated:

" 'I conclude also that if the plaintiff is entitled to recover at all in this case the actual and prospective payments made to him by the Veterans' Administration must be, as conceded by plaintiff's counsel, treated as diminution of the amount of the verdict; and in view of all the evidence in the case, including the plaintiff's various medical and surgical disabilities preceding the operation at Fort Belvoir, I would conclude that presently a sum of $7,500 would be an appropriate verdict.'

"As Judge Chesnut outlined in that portion of his decision, quoted above, Jefferson is presently receiving Veterans' Administration disability payments. Judge Chesnut's statement concerning diminution of the amount of the verdict is in accord with the recent Supreme Court decision in *United States* v. *Brown*, (348 U.S. 110, see note p. 111).

"On the basis of the foregoing factors, I strongly believe that this is a just and equitable claim and one which merits the consideration of Congress. I will deeply appreciate your cooperation in assuring early committee consideration of this claim.

"Sincerely yours,

"JOHN M. BUTLER,
"*United States Senator.*"

"APRIL 27, 1955.

"Hon. HARLEY M. KILGORE,
"*Chairman, Committee on the Judiciary,*
"*U.S. Senate, Washington, D.C.*

"DEAR SENATOR KILGORE: Further reference is made to your letter requesting a report by the Veterans' Administration relative to S. 1143, 84th Congress, a bill for the relief of Arthur K. Jefferson, which provides as follows:

" 'That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Arthur K. Jefferson, of Baltimore, Md., the sum of $20,000 for compensation for permanent injuries sustained by him as the result of an operation performed on him on July 3, 1945, at the Fort Belvoir Hospital, Va., while a member of the United States Army, in which a United States Army Medical Department towel was negligently left in his stomach and so remained until discovered and removed during a subsequent operation on March 13, 1946.

" 'SEC. 2. The sum appropriated by this act to the said Arthur K. Jefferson shall be in addition to any benefits to which he is entitled under the laws providing benefits for veterans.

" 'SEC. 3. No part of the amount appropriated in this act in excess of 10 percent thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any

person violating the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.'

"The records disclose that Arthur Knud Jefferson (C–6021497) entered on active duty with the Army of the United States on October 22, 1942. While in service on March 5, 1943, his right kidney was removed. In 1945, he was hospitalized for lengthy periods for an ill-defined condition of the gastrointestinal system. On July 3, 1945, a cholecystostomy was performed in the Army hospital at Fort Belvoir, Va., with a resulting pathological diagnosis of chronic cholecystitis.

"Mr. Jefferson was discharged from service on January 9, 1946, for the convenience of the Government. The physical examination at time of discharge listed the 1943 and 1945 operations, disclosed scars over the right kidney and gallbladder area, and stated that the abdominal wall and viscera were normal.

"Reports from Ned O. Hodous, M.D., and Johns Hopkins Hospital, Baltimore, Md., indicate that following the 1945 operation, Mr. Jefferson had numerous spells of nausea and upper abdominal pain. In December 1945, he began to vomit occasionally. On February 27, 1946, he was furnished medication on an outpatient basis at the Veterans' Administration regional office, Baltimore, Md. On March 8, 1946, Dr. Hodous, his private physician, sent him to Johns Hopkins Hospital. A report from that hospital discloses that 5 days later an exploratory laporotomy was performed. The report states, in part, that during the course of the operation, a face towel bearing the mark of the Medical Department of the United States Army was removed from the patient's stomach. Mr. Jefferson was discharged from the hospital on April 16, 1946. During the ensuing 7 months, he received outpatient treatment at the dispensary of Johns Hopkins Hospital on numerous occasions.

"Following the mentioned hospitalization, the veteran filed claims with the Veterans' Administration for reimbursement of the expenses that he had incurred. With the exception of the sum of $36.90 which did not meet the requirements of law governing the reimbursement of unauthorized medical expenses, the Veterans' Administration approved for payment all of Mr. Jefferson's claims for treatment by Dr. Hodous; hospitalization at Johns Hopkins Hospital; outpatient treatments at the hospital; medicines and dressings; and transportation to and from the hospital.

"In addition, it may be noted that since the conclusion of his treatment at Johns Hopkins Hospital, Mr. Jefferson has on numerous occasions been examined or treated for his service-connected disabilities at the expense of the Government. These include several periods of hospitalization at either the Veterans' Administration Hospital, Fort Howard, Md., or the United States Marine (Public Health Service) Hospital, Baltimore, Md., where he was hospitalized as a Veterans' Administration beneficiary.

"At the time of his discharge from service, the veteran filed an application with the Veterans' Administration for the payment of compensation for service-connected disabilities described as kidney operation, drained gall bladder, and hemorrhoids. Based on his inservice medical records, he was found, in a rating decision of March 11, 1946, to be 30 percent disabled as the result of the surgical loss of his right kidney, on the basis of which he was awarded compensation of $34.50 per month, effective January 10, 1946, the day following the date of his discharge from service. The condition of scar, postoperative, parcentesis of gall bladder, nonfunctioning, was found to be 0 percent disabling. On June 7, 1946, following receipt of the report from John Hopkins Hospital, the 30 percent rating for the loss of his right kidney was continued and he was also found to be 50 percent disabled because of adhesions, peritoneal, secondary to service surgery, with multiple intestinal resections following removal of a retained foreign body in the stomach. While these ratings combine to only 70 percent, the evidence showed that he was unemployable which accordingly warranted a total disability rating. The veteran was granted compensation for total disability, in the amount of $115 per month, effective the day following the date of his discharge from service.

"Mr. Jefferson was examined by the Veterans' Administration on July 31, 1947. As a result of that examination the previous disability ratings were continued and a rating of 40 percent was assigned, predicated on a postoperative ventral hernia. The total disability rating was continued on account of his unemployability. Further consideration was given the case on October 11, 1948, at which time he was found to be 100 percent disabled on a factual basis as the result of hernia, ventral, postoperative, severe, with intraperitoneal adhesions, secondary to surgery (drainage of gall bladder, removal of hand towel from abdomen, and drainage of multiple abdominal wall abscesses). The 30 percent disability rating for removal of his kidney was continued. The veteran's case has since been considered on several occasions, the total disability rating being continued each time. Under existing law and regulations, no further examination of the veteran is considered necessary and he will accordingly be entitled to compensation for total disability on a continuing basis. Based on the foregoing ratings, Mr. Jefferson has, since discharge, received monthly compensation payments ranging from $115 to his current award of $202, which includes $21 per month payable because of his wife.

"Further, based on his application for a waiver of payment of premiums on his $10,000 national service life insurance, Mr. Jefferson has been found to have been totally disabled for insurance purposes from and after February 20, 1945, and accordingly the premiums on his insurance contracts were waived from and after March 1, 1945. That waiver of payment of insurance premiums continues at the present time.

"In July 1947, Mr. Jefferson filed suit for $100,000 against the United States in the United States District Court for the District of Maryland, pursuant to the provisions of the Federal Tort Claims Act (60 Stat. 842), for damages allegedly sustained by him as the result of the towel having been negligently left in his abdomen during the 1945 operation. The case was tried on the merits, and thereafter, the district court, by decision dated May 7, 1948 (77 F. Supp. 706), dismissed the suit on the ground that the United States was not liable for damages under the Federal Tort Claims Act, for service-connected injuries sustained by a member of the Armed Forces of the United States. That decision was affirmed by the United States Court of Appeals for the Fourth Circuit on December 19, 1949 (178 F. 2d 518).

"The Supreme Court of the United States granted a writ of certiorari in this case. The case was combined with 2 other cases brought up under the Federal Tort Claims Act for damages on account of the death of 2 servicemen, and the 3 cases were disposed of in the same opinion (*Feres* v. *U.S.*, 340 U.S. 135, 95 L. Ed. 152). The Supreme Court concluded that the Government was not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. The decision in the Jefferson case was accordingly affirmed.

"The bill proposes to pay Mr. Jefferson $20,000 for compensation for permanent injuries sustained by him as the result of the operation performed on him on July 3, 1945. The $20,000 would be in addition to any benefits to which the veteran is entitled under laws providing benefits for veterans. The bill does not disclose the nature of the permanent injuries for which it proposes to compensate him. The Veterans' Administration compensation awards, beginning the day following the date of Mr. Jefferson's discharge from service, reflect the extent of his service-connected disabilities, including all disabilities resulting from the July 3, 1945 operation, mentioned in the bill. In this connection it should be noted that for Veterans' Administration rating purposes it is not necessary that a specific determination be made whether any disability resulted from negligence during that operation; it is sufficient that the evidence shows that the veteran's disability resulted from disease or injury incurred in or aggravated by his active military service in line of duty.

"The circumstances of this case have been carefully considered and no reason is apparent why it should be accorded special legislative treatment. To single out this veteran by awarding him, for certain of his service-connected disabilities, the lump-sum payment proposed by the bill in addition to the compensation payable for such disabilities under public law would be discriminatory against others who may be similarly situated and might prove to be a costly precedent.

"Since the bill states that the injuries were sustained by Mr. Jefferson as the result of an operation at Fort Belvoir, Va., it is assumed that your committee will obtain the views of the Secretary of Defense concerning S. 1143.

"The Veterans' Administration does not believe that private bills of this nature should receive favorable consideration.

"Advice has been received from the Bureau of the Budget that there would be no objection to the submission of this report to your Committee.

"Sincerely yours,

"JOHN S. PATTERSON,
"*Deputy Administrator*,
"(For and in the absence of the Administrator)."

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"JUNE 8, 1955.

"Hon. HARLEY M. KILGORE,
*Chairman, Committee on the Judiciary,*
*United States Senate.*

"DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army with respect to S. 1143, 84th Congress, a bill for the relief of Arthur K. Jefferson.

"The Department of the Army is opposed to the above-mentioned bill.

"This bill provides as follows:

" 'That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Arthur K. Jefferson, of Baltimore, Md., the sum of $20,000 for compensation for permanent injuries sustained by him as the result of an operation performed on him on July 3, 1945, at the Fort Belvoir Hospital, Va., while a member of the United States Army, in which a United States Army Medical Department towel was negligently left in his stomach and so remained until discovered and removed during a subsequent operation on March 13, 1946.

" 'SEC. 2. The sum appropriated by this act to the said Arthur K. Jefferson shall be in addition to any benefits to which he is entitled under the laws providing benefits for veterans.'

"The records of the Department of the Army show that Arthur K. Jefferson, who had been an aviation mechanic at the Glenn L. Martin Co., enlisted in the Army of the United States on October 22, 1942, and was assigned Army Serial No. 13135713; that at the time of his enlistment he was 45 years of age; that he had previously had an abdominal operation for appendicitis from which he had apparently recovered; that about 5 months after enlisting, and while in the Army, an abdominal operation was performed on him in an Army hospital at Indiantown Gap, Pa., during which one of his kidneys was removed; that from January 19, 1943, to May 17, 1943, he had various medical complaints diagnosed as hydronephrosis; that a subsequent diagnosis of herpes of the lower lip was reported cured on February 7, 1943; that on February 19, 1943, a further diagnosis of this soldier indicated pleurisy, which was reported cured on March 3, 1943; that from February to April 1945 he had an ill-defined condition of the gastrointestinal system, including vomiting,

with nonfunctioning gall bladder; that on July 3, 1945, he was operated on for cholecystostomy in the Army hospital at Fort Belvoir, Va., by the chief surgeon at said hospital, and that he was honorably discharged from the Army on January 9, 1946.

"A few days after his discharge from the Army Mr. Jefferson filed a formal application with the Veterans' Administration for compensation on account of service-connected disability. On March 18, 1946, the Veterans' Administration awarded to the claimant disability compensation in the amount of $34.50 per month, retroactively to January 10, 1946 (the day following the date of his discharge from the Army), upon a service-connected disability rating of 30 percent on account of the surgical removal of a kidney while he was in the military service.

"Around the end of February 1946 Mr. Jefferson began to suffer from vomiting spells and nausea, which grew increasingly more severe until March 8, 1946, when he went to the Johns Hopkins University Hospital in Baltimore, Md., for treatment. On March 13, 1946, he was operated on at said hospital. The operating surgeon found a well-healed medical scar in the front of the abdomen, through which he operated. During the course of such operation the surgeon found a towel in the lower part of Mr. Jefferson's stomach which had partly worked into the duodenum. The towel was removed, measured, and photographed. It was 30 inches long by 18 inches wide and was marked "Medical Department U.S. Army." After his operation Mr. Jefferson was treated at the United States Marine Hospital in Baltimore, medically and surgically. It was found that he had sustained a serious hernia, which was attributed to the aftereffects of the operation performed on him at the Johns Hopkins University Hospital and thought to have been caused by inflammation or infection as a postoperative result of the removal of the towel.

"The Department of the Army has been advised by the Veterans' Administration that on June 7, 1946, the compensation of Mr. Jefferson wins increased to $115 per month, retroactively to January 10, 1946 (less the prior payments that had been made to him at the rate of $34.50 per month), upon a disability rating of 100 percent. In a letter to the Department of the Army, dated July 22, 1953, the Veterans' Administration further advised with respect to this claimant as follows:

" 'The veteran's compensation was increased from $115 monthly to $138 monthly from September 1, 1946, under Public Law 662, 79th Congress, and further increased to $159 monthly from September 1, 1948, under Public Law 877, 80th Congress, which legislation authorized the payment of additional compensation for his wife. Under Public Law 339, 81st Congress, his payments were increased to $171 monthly from December 1, 1949. They were reduced to $150 monthly from September 14, 1951, on account of the death of his wife, and increased to $171 monthly from March 6, 1952, on the basis of remarriage. His compensation was further increased to $193.50

monthly effective July 1, 1952, under Public Law 356, 82d Congress, and he is being paid this monthly rate of compensation at this time. Estimated from the awards in file, this veteran is shown to have received compensation to date of approximately $14,000.'

"In September 1947, Mr. Jefferson filed a suit against the United States in the United States District Court for the District of Maryland (Civil Action No. 3692) in which he prayed for a judgment against the Government under the Federal Tort Claims Act in the amount of $100,000 and costs for the damages sustained by him as the result of a towel having been left in his abdomen at the time he was operated on in an Army hospital on July 3, 1945. After a trial of this case on the merits the district court dismissed the suit on the ground that the United States was not liable in damages under the Federal Tort Claims Act in a suit of this character for service-connected injuries sustained by a member of the Armed Forces of the United States (*Jefferson* v. *United States*, 77 F. Supp. 706). The district court in its opinion on the case held, in pertinent part, as follows (p. 711):

"'* * * the Federal Tort Claims Act does not cover this case of the plaintiff because it was a service-connected disability occurring while the plaintiff was an enlisted man in the United States Army and occurring as a result of negligence on the part of employees of the Government at the hospital.'

"The decision of the district court dismissing the suit of Mr. Jefferson was affirmed by the United States Court of Appeals for the Fourth Circuit (*Jefferson* v. *United States*, 178 F. 2d 518). The Supreme Court of the United States granted a writ of certiorari to review the decision in this case. It also granted writs of certiorari to review the decisions of other lower Federal courts in 2 other cases brought under the Federal Tort Claims Act for damages on account of the death of 2 servicemen, who allegedly lost their lives as the result of negligence on the part of military personnel while in the performance of their official duties. The three cases were heard together and disposed of in the same opinion by the Supreme Court (*Feres* v. *United States*, 340 U.S. 135). The Supreme Court, in holding that no recovery could be had in any of said cases, said (pp. 144–146):

"'No Federal law recognizes a recovery such as claimants seek. * * *

"'This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. * * *

"'A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage. * * * The compensation system, which normally requires no litigation, is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely

favorably with those provided by most workmen's compensation statutes. * * *

" 'We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by Federal law. We do not think that Congress, in drafting this act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.'

"The compensation benefits that have been and are now being paid by the Veterans' Administration to Mr. Jefferson are not "negligible or niggardly," but are substantial. Informal advice received by this Department from the Veterans' Administration indicates that veterans' compensation at the rate of $193.50 per month as indicated in that Administration's letter of July 22, 1953, was continued through September 30, 1954; that, on October 1, 1954, the rate was increased to $202 per month, which Mr. Jefferson is currently receiving; and that the benefits paid to him through March 31, 1955, total approximately $18,000. The life expectancy of the average man of his age is 16 years. If Mr. Jefferson lives that long, he will have collected from the United States, on account of his service-connected disabilities, compensation aggregating at least $56,000.

"In the light of the foregoing facts and the authorities herein cited, there is no legal or equitable basis for the granting of any additional compensation to this claimant on account of the disabilities incurred by him while he was in the Army. His original Veterans' Administration disability rating of 30 percent was increased to 100 percent, obviously as the result of the operation performed upon him on July 3, 1945, at Fort Belvoir, Va. The enactment of the present bill granting to him a special award of $20,000, in addition to the compensation which he has received, is now receiving and will continue to receive from the Veterans' Administration, would be highly discriminatory in that it would grant to this claimant a special benefit which is denied by general law to all other former servicemen in like circumstances. The Department of the Army, therefore, while deeply regretting the fact that the claimant incurred disability while in the military service, is obliged to recommend that this bill be not favorably considered by the Congress.

"A similar report was rendered by this Department on H.R. 4239, 83d Congress, a bill for the relief of Arthur K. Jefferson, upon which no action was taken by the Congress.

"The cost of this bill, if enacted, will be $20,000.

"The Bureau of the Budget advises that there is no objection to the submission of this report.

"Sincerely yours,

"ROBERT T. STEVENS,
"*Secretary of the Army.*"

The foregoing report sets forth two other bills in support of the favorable action thereon. One is for the relief of Curtis W. Strong in the sum of $4,607 for loss of pay incurred during an operation performed on June 10, 1918 in the U.S. Army Field Hospital in Toul, France, and the treatment following during which two rubber drainage tubes were permitted to remain in his left chest which ultimately resulted in the claimant being incapacitated for work during the period May 29, 1944, to June 1, 1951. This bill was H.R. 3725 of the 83rd Congress which became Private Law 418 of the 83rd Congress.

The other case for congressional relief under similar circumstances was that of David Hanan being H.R. 5436 of the 83d Congress which provided for the payment to Mr. Hanan of $3,000 in full settlement of all his claims against the United States for personal injuries, medical and hospital expenses, sustained by him as the result of improper surgical treatment which he received from personnel of the U.S. Army in an operation on April 1, 1943, at Camp Claiborne, La., causing continuing personal injury and pain and suffering and necessitating a further operation by civilian doctors which disclosed a surgical sponge in his abdomen. H.R. 5436 became Private Law 504 of the 83d Congress. It may be noted that in the Jefferson, Strong, and Hanan cases the amounts involved are quite different than in the Brou claim but in this connection it should be noted that in the three cases injuries were of a temporary nature, while in the case of Captain Brou the injuries are total, complete, and permanent.

To review the facts of the Brou claim is to come to the following conclusions as evidenced by the clinical record of Walter Reed Hospital.

1. Captain Brou at the time that record was compiled was 40 years of age.

2. Captain Brou, according to her affidavit and the affidavit of her doctor, Dr. Martha Ray Lumpkin, was an excellent skier and water sports enthusiast and that Dr. Lumpkin through her personal knowledge states that Captain Brou was active in golf, camping, tennis, and was considered to be of superior athletic abilities. Captain Brou, then prior to the incident which caused her complete infirmity, was in the best of health with the exception of an eye complaint.

3. In accordance with what is generally known as accepted procedure when a person on active duty with the military has any physical complaint, they present themselves to their medical unit. This was the procedure that Captain Brou followed in reporting to the Andrews Air Force Base Hospital and was referred by them to the chief of neurology, Col. Ludvig Kempe at Walter Reed Army General Hospital.

4. According to the affidavit of the claimant, the chief of neurology, Col. Ludvig Kempe, stated that the claimant's symptoms were so unusual according to Dr. Kempe and Maj. Darwin Ferry, that they told the claimant they would document her case for the American Medical Association Journal if she had no objection and would sign a release.

5. In furtherance of this theory, Dr. Ferry had claimant attend a medical staff meeting in which he demonstrated the bulging of her right eye to the attendees.

6. In late December 1967 diagnostic procedures were performed with radiologists and neurosurgeons in attendance, along with a regular chief technician and several other technicians. There were no complications, and the procedures gave evidence of venous occlusion behind

her right eye. After the test was performed the vision of the claimant cleared.

7. From the affidavits of the claimant and Dr. Lumpkin, it was determined that Dr. Kempe called the claimant several times and advised her that she should return to Walter Reed Hospital for one more diagnostic procedure just in case she would ever require surgery in the future or if surgery were possible due to an automobile accident, blackout, or cranial injury. Claimant was not impressed with this reasoning and demurred to the test.

8. After receiving a call from Dr. Kempe, the claimant consulted her own physician and discussed the entire case to ascertain the nature of the test, inherent dangers, and so forth. Dr. Kempe assured the claimant that she was in no imminent danger, and that it was a simple diagnostic procedure as previously done with no more risk than in a tonsillectomy or appendectomy.

9. Dr. Kempe again called the claimant in late March or early April 1968 at which time the claimant agreed to reenter the hospital for this last test because she was frightened by what Dr. Kempe had impressed upon her.

10. Claimant entered the hospital on the evening of April 15, 1968, and on the following day underwent the required examinations, lab work, and other tests.

11. On that same evening Major Guiterrez, a radiologist, called on her to discuss the test, at which time he assured her it would be no different than the two tests administered in December.

12. On the next morning the claimant was taken to the diagnostic room, and noted that the number of medical personnel in attendance was about half those in attendance at the identical tests in December, and in particular noted the absence of the chief technician.

13. The claimant recalls quite vividly the attending technician cautioning Dr. Guiterrez not to go so fast in his preparation. He also cautioned the doctor during the actual procedure to "slow down and not be in such a hurry", because there were certain things he had to do in concert with the doctor.

14. The claimant was fully conscious when Dr. Guiterrez injected the contrast material, and she immediately felt her right hand draw up into an open clinch position. Concurrently she felt she was unable to breathe, and that she was swallowing her tongue. At that moment she told the doctor that something had gone wrong; she could not breathe and needed oxygen and she was afraid she was swallowing her tongue. The claimant blacked out for a short time and when she came to Dr. Guiterrez asked her if he could go on with the second part of the test. The claimant told the doctor that she could not proceed with the test, that she needed oxygen and that she could not breathe. The claimant asked for Dr. Ferry. No one was attempting to assist her and she had to use her left hand to dislodge her tongue so she could breathe. Moments later Dr. Ferry arrived and after a consultation with Dr. Guiterrez, the claimant was returned to the ward where Dr. Ferry took over all treatments.

15. The claimant was placed on the critical list and her family was notified.

16. From this time on the claimant was treated on a subsist elsewhere basis and on September 19, 1968, she was discharged from the Air Force with a 100-percent permanent disability.

17. In June 1969 the claimant visited Dr. Kempe for his assessment and re-evaluation of her progress, the doctor stated that he was very

disturbed about what had happened to her as a result of the diagnostic procedure because he had learned subsequently that Dr. Guiterrez had not previously performed one of these procedures and therefore was not familiar with the technique, even though he had claimed he was, before he was assigned to perform the procedure on the claimant.

18. During a subsequent visit to Dr. Kempe, he informed the claimant that she was 1 case in 20,000 that ended in hemiparesia as a result of a diagnostic procedure.

The obvious fact from this report is that the claimant is completely disabled as a result of this diagnostic procedure performed by Dr. Guiterrez and in a matter of minutes changed from a completely healthly person to one who is totally and completely disabled.

The report of the Department of the Army states that the claimant is receiving $606.95 per month in disability retirement payments and their records reveal no evidence of misfeasance or negligence on the part of the Army personnel in the performance of the diagnostic procedure or during subsequent treatment.

The committee does not necessarily concur in this statement. From the foregoing facts the committee comes to the conclusion that the diagnostic procedure initiated by Dr. Kempe was the proximate cause of the claimant's disability; that prior to that time the claimant was a healthy individual; the committee believes that had not Dr. Kempe persuaded the claimant to come in for further tests, the claimant would not find herself in the condition that she now faces; and the committee believes that the importunities of Dr. Kempe and the diagnostic procedure performed by Dr. Guiterrez were the proximate cause which lead to the claimant's total disability. Without associating misfeasance per se or neglect per se, the committee can come to no other conclusion that had not these two factors occurred in the history of the claimant, she would not now be in the condition of total disability. The committee realizes that the claimant receives over $600 per month in disability payments, but does not feel that this in any way constitutes repayment for the suffering, anxiety, and total disability that the claimant is forced to live with the rest of her life.

As noted previously, the committee has set forth the case of *United States* v. *Realty* in which the Supreme Court defines what are the debts of the United States. The committee realizes that debts are not limited to those which are evidence by some written obligation or to those which are otherwise of a strictly legal character. The committee however does not believe that under the *Realty* case that this is a debt which would be paid based upon considerations of pure charity or a gratuity, but the committee takes the position, as does the *Realty* case, that this is a debt to an individual when his claim grows out of general principles of right and justice, when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could not obtain recognition in a court of law.

The committee feels very strongly about this case and considers it to be one of such unusual character and occurring under such unusual circumstances that there is a definite obligation on the part of the Government of the United States to further reimburse this claimant are requested in S. 3419. The committee therefore recommends that the bill, S. 3419, be considered favorably.

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